

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 00-0467  
State Use Tax—Rental of Tangible Personal Property  
For Tax Years 2000-2002**

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**ISSUE**

**I. State Use Tax—Rental of Tangible Personal Property**

<b><u>Authority:</u></b>	<b>IC § 6-2.5-3-1</b>	<b>45 IAC 2.2-3-4</b>
	<b>IC § 6-2.5-3-2</b>	<b>45 IAC 2.2-3-18</b>
	<b>IC § 6-2.5-3-6</b>	<b>45 IAC 2.2-3-19</b>
	<b>IC § 6-6-8.1-5-1(b)</b>	<b>45 IAC 2.2-4-27</b>

Taxpayer protests proposed assessments of the state's use tax on rentals of equipment necessary to remediate contaminated groundwater, pursuant to regulations promulgated by the Indiana Department of Environmental Management.

**STATEMENT OF FACTS**

Taxpayer is a full service "convenience" store and gas station located in extreme southern Indiana. During the tax years at issue, the manager of taxpayer's business, Ms. D, had numerous responsibilities, including ordering, monitoring customer fill-ups, bank deposits, accounting functions, financial reports, payroll, and filing returns for federal, state, and local taxes. Ms. D was involved in all aspects of taxpayer's business operations, which included movie rentals, deli service, gasoline service, and selling many specialty items for rural farmers and hunters. Ms. D. became closely involved with the gasoline leak problem from its discovery. Although she is currently employed elsewhere, Ms. D continues to provide taxpayer with help with reports required to be sent to the Indiana Department of Environmental Management (IDEM) and the tax audit at issue in this protest.

As thoroughly documented and explained in the written materials Ms. D provided to the Department, the following sequence of events led to the eventual tax assessments at issue.

The owners of a home located directly across the street from taxpayer's store/gas station noticed a strong odor of gasoline in their basement in April of 1995. When shown a vial of contaminated water from their basement, Ms. D contacted taxpayer and the investigation began. Members of the emergency response division from IDEM were called in as well as the State Fire Marshall.

The homeowners had to vacate their home. Emergency abatement processes began. Ms. D hired an environmental services company (ESC) to find the source of the leak, determine how gasoline migrated to the homeowner's basement, and devise a plan to rehabilitate contaminated ground water once the source of the leak was identified and neutralized. IDEM supervised the abatement and remediation project and exercised control over the actions taken by the environmental services company, taxpayer, and Ms. D.

The source of the leak was identified and plugged. The ESC installed monitoring wells in IDEM-approved locations on the property, checking for levels of BTEX, MTBE, and other gasoline additives.

The next step was IDEM approval of a corrective action plan (CAP). The CAP essentially contains IDEM's expectations of what a "polluter" must do to eliminate contamination; IDEM must approve every step of every CAP proposed in the State of Indiana. IDEM did approve taxpayer's CAP, which was developed by the ESC. Because of the geological structure taxpayer's store/gas station sits on, the company suggested, and IDEM approved, using an Air Sparge Unit to remediate the contaminated groundwater. This unit was installed in the monitoring wells. The unit blows oxygen and ozone into contaminated water; bubbles form; the hydrocarbons begin breaking down; a vacuum then removes the air.

The unit is completely automatic and works off a timer set by the ESC. The unit runs for a few hours at a time at different times of the day. If the system shuts itself off, taxpayer must call the environmental services company to start it again. The company asked Ms. D several times to read a few display numbers over the telephone. The ESC checks on the system frequently and moves the unit from well to well for even remediation of the contaminated groundwater. The company also takes quarterly samples and produces the reports required to be sent to IDEM. Taxpayer does nothing to operate this system; it needs no operator because it is automated, and required for a long-term groundwater remediation project.

## **I. State Use Tax—Rentals of Tangible Personal Property**

### **DISCUSSION**

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." In order to prevail in this protest, taxpayer must show that under all the relevant facts, statutes, regulations, and case law, if any, that the protest should be sustained.

IC § 6-2.5-3-1 defines "use" as "the exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-2 imposes the use tax "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. 45 IAC 2.2-3-4 states that tangible personal property purchased in Indiana, or elsewhere, "and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax . . . unless the Indiana state gross retail tax has been collected at the point of purchase. Liability for the tax rests with "the

person who stores, uses, or consumes such property. 45 IAC 2.2-3-18. The retail merchant collects the tax as “agent for the state of Indiana.” 45 IAC 2.2-3-19. *See also*, IC § 6-2.5-3-6.

45 IAC 2.2-4-27 speaks directly to the renting and leasing of tangible personal property: “In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.” The ESC fits squarely within the definitions contained in this regulation, and under normal circumstances, would have collected and remitted to the Department the state gross retail tax on the rental transactions between ESC and taxpayer. The ESC did not, thereby subjecting taxpayer to use tax liability.

However, the circumstances surrounding the rental of the Air Sparge Units to taxpayer certainly were not normal, nor do the transactions fit neatly into those situations covered by 45 IAC 2.2-4-27. The ESC, relying on Information Bulletin # 42, did not charge taxpayer sales tax pursuant to 45 IAC 2.2-4-27(d)(3)(B): “The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.”

The ESC provides a service to taxpayer; it “performs a specific job,” i.e., remediation of contaminated groundwater, “in a manner to be determined by the owner of the property,” i.e., the ESC pursuant to the CAP developed in conjunction with IDEM. Taxpayer does not and “cannot exercise control” over the Sparge units. In this case, the fact that the operator is infrequently there is immaterial. The equipment is automated, and any adjustments to the equipment are performed, when necessary, by the ESC. The equipment does not require an operator to be present in order to function, but the equipment is effectively operated by the lessor, the environmental services company.

### **FINDING**

Taxpayer’s protest regarding the proposed assessment of use tax is sustained.

DMF/JMM/MR 020808